

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

ORIGINAL COPY

MICHAEL LEE SIMPSON and TOMMY WAYNE SIMPSON, PETITIONERS

v.

UNITED STATES OF AMERICA

MICHAEL LEE SIMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 76-5761

MICHAEL LEE SIMPSON and TOMMY WAYNE SIMPSON, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 76-5796

MICHAEL LEE SIMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
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OPINION BELOW

The opinion of the court of appeals (Pet. No. 76-5761 App.
1-3) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on
October 14, 1976. A petition for rehearing was denied on
November 17, 1976. The petition for a writ of certiorari in

No. 76-5761 was filed on November 26, 1976, and in No. 76-5796,
on December 3, 1976. The jurisdiction of this Court is invoked
under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant's conviction for aggravated bank
robbery under 18 U.S.C. 2113(d) automatically precludes a
simultaneous conviction and consecutive sentence for using a
firearm during the robbery, in violation of 18 U.S.C. 924(c)(1).

STATUTES INVOLVED

18 U.S.C. 2113 provides in pertinent part:

(a) Whoever, by force and violence, or
by intimidation, takes, or attempts to take,
from the person or presence of another any
property or money or any other thing of value
belonging to, or in the care, custody, control,
management, or possession of, any bank, credit
union, or any savings and loan association;

* * *

Shall be fined not more than \$5,000 or
imprisoned not more than twenty years, or both.

(d) Whoever, in committing, or in
attempting to commit, any offense defined in sub-
sections (a) and (b) of this section, assaults
any person, or puts in jeopardy the life of any
person by the use of a dangerous weapon or device,
shall be fined not more than \$10,000 or imprisoned
not more than twenty-five years, or both.

18 U.S.C. 924(c) provides:

Whoever--

(1) uses a firearm to commit any felony for
which he may be prosecuted in a court of the United
States, or

(2) carries a firearm unlawfully during the
commission of any felony for which he may be prosecuted
in a court of the United States, shall, in addition to
the punishment provided for the commission of such
felony, be sentenced to a term of imprisonment for not
less than one year nor more than ten years. In the
case of his second or subsequent conviction under
this subsection, such person shall be sentenced to a
term of imprisonment for not less than two nor more
than twenty-five years and, notwithstanding any other
provision of the law, the court shall not suspend the

sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted of aggravated bank robbery and of using firearms to commit the robbery, in violation of 18 U.S.C. 2113(a) and (d) and 924(c)(1). Each was sentenced to consecutive terms of 25 years' imprisonment on the robbery count and 10 years' imprisonment on the firearm count. After another jury trial for a second robbery, petitioners were again convicted of one count of aggravated bank robbery and one count of using firearms to commit the crime. Each was sentenced to 25 years' imprisonment for the robbery and 10 years' imprisonment on the firearm count, the sentences to run consecutively to each other and to the sentences previously imposed. The court of appeals affirmed in a consolidated appeal (Pet. App. 1-3).^{1/}

On September 18, 1975, petitioners robbed the East End Branch of the Commercial Bank of Middlesboro, Kentucky at gunpoint. They took approximately \$40,000 from the bank. Less than two months later, on November 4, 1975, petitioners returned to Middlesboro to rob the West End Branch of the Commercial Bank. This robbery was also accomplished at gunpoint, and again about \$40,000 in bank funds was taken.

To accomplish their escape after the second robbery, petitioners stole the bank manager's automobile after locking the bank personnel in the vault. A police roadblock was set up outside town, and, after an exchange of gunfire, petitioners were taken into custody.

^{1/} "Pet." denotes the petition in No. 76-5761 and "Pet. App." denotes the appendix to that petition.

ARGUMENT

Petitioners contend (Pet. 4-5) that the court of appeals erroneously upheld their firearms convictions under 18 U.S.C. 924(c), after they had been convicted of aggravated bank robbery under 18 U.S.C. 2113(d), and that the decision below conflicts with the decision of the Court of Appeals for the Eighth Circuit in United States v. Eagle, 539 F.2d 1166. Although we believe that the court of appeals correctly rejected petitioners' contention in this case, we recognize that a conflict among the circuits exists on this issue and thus do not oppose the petitions for certiorari.

1. Section 924(c), passed as part of the Gun Control Act of 1968, makes it a federal offense for a person to use or unlawfully carry a firearm during the commission of "any felony for which he may be prosecuted in a court of the United States" (emphasis added). For a first offender, the punishment is set at not less than one nor more than ten years' imprisonment, "in addition to the punishment provided for the commission of [the underlying] felony." More severe sanctions are imposed upon a second or multiple offender, who faces an additional sentence of at least two and as many as 25 years' imprisonment without possibility of a suspended sentence or probation. Concurrent sentences are expressly prohibited.

Petitioners were convicted of aggravated bank robbery under 18 U.S.C. 2113(a) and (d). For the crime of bank robbery defined in subsection 2113(a), the maximum penalty is a \$5,000 fine and 20 years' imprisonment. Subsection 2113(d) states, however, that "[w]hoever, in committing, or attempting to commit, any offense defined in [2113(a) or (b)] assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not

more than twenty-five years, or both." It is unquestioned, of course, that a conviction under Sections 2113(a) or (d) is a felony; ^{2/} the sole question is whether, despite the language "any felony" used in Section 924(c), Congress intended that a conviction under Section 2113(d) would bar an additional conviction under 924(c).

We do not believe that Congress so intended. On its face the language of Section 924(c), applying to "any felony" that may be prosecuted in federal court, admits of no exceptions. In addition, that Section contains important provisions that apply solely to this statute and are not incorporated into other statutes, such as 18 U.S.C. 2113(d), providing for enhanced penalties. Thus, Section 924(c) establishes minimum sentences (without possibility of suspension or probation in the case of repeat offenders), imposes more severe punishment on repeat offenders, and prohibits concurrent sentencing. These specific provisions would be completely displaced by the reasoning of the court of appeals.

Comparison between Section 924(c) and Section 2113(d) leads to a similar conclusion. The test for determining whether Congress intended to define and punish separate offenses is "whether each provision requires proof of a fact which the other does not" (Blockburger v. United States, 284 U.S. 299, 304). Under Section 924(c), the prosecution must prove that the defendant used or unlawfully carried a firearm during commission of a federal felony; under Section 2113(d), the prosecution need not show use or possession of a firearm but must prove either an assault or the placing of a life in jeopardy "by the use of a dangerous weapon or device" (emphasis added). ^{3/} According to the Blockburger test,

^{2/} A felony is defined in 18 U.S.C. 1 as "[a]ny offense punishable by death or imprisonment for a term exceeding one year."

^{3/} The courts of appeals have disagreed over whether the words "by the use of a dangerous weapon or device" modify the word "assault." Compare United States v. Beasley, 438 F.2d 1279 (C.A. 6), with Bradley v. United States, 447 F.2d 264 (C.A. 8).

therefore, the offenses are clearly separate and subject to cumulative punishment. Moreover, it would produce a curious result to hold that the possibility of an additional five year sentence under Section 2113(d) would free a defendant from a possible 10 year sentence (with a one year minimum) under Section 924(c), while also relieving him from operation of the other specific provisions discussed above. ^{4/}

To override the strong evidence of congressional intent expressed in Section 924(c), any contrary legislative history should be compelling. Petitioners, like the Eighth Circuit in United States v. Eagle, supra, rely solely upon a statement by Representative Poff during floor debates that "this section is not intended to apply to Title 18, Sections 111, 112, or 113 which already define the penalties for use of firearms in assaulting officials, with Sections 2113 or 2114 concerning armed robberies of the mail or banks, with Section 2231 concerning armed assaults upon process servers or with Chapter 44 which defines other firearm felonies" (114 Cong. Rec. 22232). Although these remarks, viewed in isolation, suggest an intent to render Section 924(c) inapplicable in a case such as this, we nevertheless do not believe that they will bear the weight that petitioners place upon them.

The debates on the Poff amendment show a commitment by Congress to limit the use of guns in federal crimes. Indeed, Congressman Poff, shortly after making the statement quoted above, stated plainly: "My amendment would apply to all Federal felonies including heinous crimes in all grades, down to

^{4/} This disparity would be even more marked in the case of the repeat offender, who could be sentenced to as many as 25 years' imprisonment under Section 924(c), but would remain exposed to only five additional years of imprisonment under Section 2113(d), no matter how many times in the past he had been convicted of using a firearm in the commission of a federal felony.

the lowest level of a felony" (114 Cong. Rec. 22233). In particular, the debates show an intention to impose mandatory minimum sentences in all cases involving firearms, "to persuade the man who is tempted to commit a federal felony to leave his gun at home" (114 Cong. Rec. 22231). The concern, moreover, was with firearms, not merely with dangerous weapons; "[e]ven where the crime does not result in death or injury, the use of a gun extends both its potential and actual seriousness beyond that of crimes committed without deadly weapons or with weapons affective only at a very short range" (114 Cong. Rec. 22247) (Rep. Horton). Under the circumstances, the need for imposing the additional sanctions of Section 924(c) on felons employing firearms seems plain.

2. The Court of Appeals for the Eighth Circuit in United States v. Eagle, supra, has held invalid the conviction under Section 924(c) of a defendant also convicted of assault with a dangerous weapon under 18 U.S.C. 1153. Placing heavy reliance on the statement by Representative Poff set forth above, the court reasoned that "[i]t is not necessary to deterrence to impose an increased penalty for use of a firearm by separate statute, when the substantive statute itself does so." (539 F.2d at 1172).

For the reasons stated in the previous section, we believe that the decision of the Eighth Circuit in Eagle is incorrect. We recognize, however, that the decision of the court of appeals in this case is in conflict with the decision in Eagle, and for that reason, we do not oppose granting the petition for a writ of certiorari.

Respectfully submitted.

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